

NOT INCLUDED IN  
BOUND VOLUMES

PMH  
Niles, IL

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LIFEWAY FOODS, INC.  
Employer

and

Case 13-RC-113248

BAKERY, CONFECTIONARY,  
TOBACCO WORKERS, AND  
GRAIN MILLERS INTERNATIONAL UNION,  
LOCAL UNION NO. 1  
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 19, 2014, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 89 for and 65 against the Petitioner, with 1 void ballot, 11 ballots to be counted,<sup>1</sup> and 12 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions<sup>2</sup> and briefs, has adopted the hearing officer's findings<sup>3</sup> and recommendations,<sup>4</sup> and finds that a certification of representative should issue.

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<sup>1</sup> After the election, the parties agreed that these 11 previously challenged individuals were eligible.

<sup>2</sup> In addition to its other objections, the Employer filed 21 bare, unbrieffed exceptions to the hearing officer's findings. In the absence of any argument explaining

## CERTIFICATION OF REPRESENTATIVE

why those findings should be overturned, we find that they should be disregarded. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) (“The [r]espondent merely recites the findings excepted to and cites to the judge’s decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned. . . . [W]e find, in accordance with Sec. 102.46(b)(2), that the [r]espondent’s exceptions . . . should be disregarded.”), *enfd.* 456 F.3d 265 (1st Cir. 2006). Member Miscimarra believes that a bare exception—one that lacks any explanation or support either in the exception or the supporting brief—should be disregarded, absent unusual circumstances. Here, the Employer has not pointed to any unusual circumstances, and Member Miscimarra’s review of the record discloses none. Accordingly, Member Miscimarra agrees with his colleagues it is appropriate to disregard the Employer’s bare exceptions.

The Employer alleges, for the first time in its brief in support of exceptions, that Board agents failed to maintain custody of ballot boxes. The Employer did not raise this allegation in its objections or in the proceeding below. “The Board has long held that it will not consider, as objectionable, conduct which was neither alleged in a timely filed objection nor discovered by a regional director during the course of his investigation of such an objection, unless the objecting party presents clear and convincing proof that the unalleged misconduct not only is newly discovered but also was previously unavailable.” *Tuf-Flex Glass*, 262 NLRB 445, 445 fn. 3 (1982), *enfd.* 715 F.2d 291 (7th Cir. 1983). In this case, the Employer does not even assert that the alleged misconduct either is newly discovered or was previously unavailable. Accordingly, we reject the Employer’s allegation as untimely.

<sup>3</sup> The Employer contends that it was deprived of due process on the following grounds: it was prejudiced by the Spanish interpreter’s translations of testimony and documentary evidence; the hearing officer conducted off-the-record discussions; the hearing officer overruled its objections to the testimony of one of the Petitioner’s witnesses; the hearing officer commented about the Petitioner’s evidence and recited some arguments made by the Petitioner; and the hearing officer relied on the wrong legal standards and misunderstood testimony. After a review of the record and the hearing officer’s rulings and findings, we find no merit to the Employer’s contentions.

<sup>4</sup> The Employer has excepted to some of the hearing officer’s credibility findings. The Board’s established policy is not to overrule a hearing officer’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

In adopting the hearing officer’s finding that the Petitioner’s Morton Grove observer’s use of a list of voters to be challenged was not objectionable, we note that the two-member case he cited in support, *Regency Grande Nursing & Rehabilitation Center*, 354 NLRB 530 (2009), was reaffirmed by the Board at 355 NLRB 587 (2010). See also *Mead Southern Wood Products*, 337 NLRB 497, 498 (2002) (no basis to overturn election where petitioner’s observer used petitioner’s challenge list, which was visible to voters, solely for challenge purposes).

IT IS CERTIFIED that a majority of the valid ballots have been cast for Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

Dated, Washington, D.C. June 10, 2015.

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD